

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GISELLE L. LEWIS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Syracuse, NY

*Docket No. 99-621; Submitted on the Record;
Issued May 25, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether appellant has established an injury in the performance of duty on November 14, 1994.

In the present case, appellant filed a claim on December 5, 1994, alleging that she injured her back and neck in the performance of duty on November 14, 1994. By decision dated September 30, 1995, the Office of Workers' Compensation Programs denied the claim on the grounds that appellant had not established an employment incident as alleged. In a decision dated September 8, 1998, the Office hearing representative affirmed the September 30, 1995 Office decision.¹

The Board has reviewed the record and finds that appellant has not established an injury in the performance of duty on November 14, 1994.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing that he or she sustained an injury while in the performance of duty.³ In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally "fact of injury" consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the

¹ The history of the case indicates that, by decision dated December 29, 1995, the Office denied a request for an oral hearing. By decision dated February 25, 1997, the Board granted the Director's motion to remand the case in order to allow appellant a proper opportunity to request an oral hearing; *see* Docket No. 96-959.

² 5 U.S.C. §§ 8101-8193.

³ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.110(a).

employment incident caused a personal injury, and generally this can be established only by medical evidence.⁴

In this case, the Office has not accepted that appellant sustained an incident as alleged on November 14, 1994. It is well established that a claimant cannot establish fact of injury if there are inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged.⁵ Appellant alleged that on that date she felt a sharp pain in her back while filing x-ray jackets. The Board finds that the evidence of record contains inconsistencies that cast doubt on the validity of the claim.

With respect to notification, appellant has asserted that she told a supervisor, Cecilia Slater, of her injury shortly after the alleged incident. Ms Slater, however, provided a December 9, 1994 statement that appellant did not report an injury to her until December 5, 1994. The record also contains a statement from a coworker indicating that, on November 29, 1994, appellant stated that she injured her back while she was away on a visit.⁶

With respect to medical treatment, the record contains an employing establishment health unit note dated November 24, 1994, which indicates some paraspinal spasms but provides no history of the alleged incident. An employing establishment health unit note dated November 29, 1994 states that appellant had an onset of back pain two weeks ago on awakening one morning, and reports “no hx [history of] trauma or heavy lifting.” The first medical report to mention a work injury on November 14, 1994 appears to be a report dated December 12, 1994 from Dr. J.J. Cambareri, an orthopedic surgeon, who noted that on that date appellant was “lifting filing boxes.”

The Board finds that the evidence of record is not consistent with appellant’s alleged employment incident on November 14, 1995. The record does not establish prompt notification of injury, contemporaneous medical treatment with a history of the alleged incident, or other actions consistent with the occurrence of an employment incident at the time, place and in the manner alleged. The Board accordingly finds that appellant has not established an incident in the manner alleged on November 14, 1995, and therefore she has not established an injury in the performance of duty.

⁴ See *John J. Carlone*, 41 ECAB 354, 357 (1989).

⁵ *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

⁶ Appellant also stated that she told a coworker, Ms. Lawson, of a work injury, but the record does not contain any statement from Ms. Lawson as to this allegation.

The decision of the Office of Workers' Compensation Programs dated September 8, 1998 is affirmed.

Dated, Washington, D.C.
May 25, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member